

Anonymised version

Translation

C-593/21 – 1

Case C-593/21

Request for a preliminary ruling

Date lodged:

24 September 2021

Referring court:

Cour de cassation (Belgium)

Date of the decision to refer:

10 September 2021

Appellant:

NY

Respondent:

Herios SARL

Cour de cassation (Court of Cassation, Belgium)

Judgment

[...] [reference of the judgment]

[...] NY

appellant in cassation,

[...] [identification of the appellant's lawyer]

v

HERIOS, limited liability company [...] [identification of the respondent]

respondent in cassation,

[...] [identification of the respondent's lawyer]

I. Procedure before the Court

This appeal in cassation is directed against the judgment delivered on 16 January 2020 by the cour d'appel de Liège (Court of Appeal, Liège).

[...]

[...] [procedural considerations]

II. Facts and background to the proceedings

[...] [T]he facts of the case and the background to the proceedings may be summarised as follows.

The respondent had concluded a commercial agency contract with a German company called Pöensgen, under which it had the exclusive right to sell the principal's products [...] in Belgium, France and Luxembourg.

In 2009, it hired the appellant, under an oral contract, as a paid subagent, with the task of undertaking negotiations in relation to the products distributed by Pöensgen in the abovementioned territory.

At the end of 2015 and the beginning of 2016, discussions took place between the appellant, the respondent and Pöensgen concerning the direct pursuit of the commercial agency by the appellant and the cessation of the respondent's corresponding activities, but to no avail.

On 8 June 2016, Pöensgen gave six months' advance notice of termination of the contract concluded with the respondent, with the result that the contractual relationship ended on 31 December 2016.

The [appellant] became Pöensgen's commercial agent in January 2017 and a contract was concluded between them in April 2017.

By letter of 23 February 2017, the respondent terminated the contract between it and the appellant as a result of exceptional circumstances which made any professional cooperation between the principal and the agent impossible in the long term, namely termination of the main contract.

On 22 May 2017, the respondent and Pöensgen agreed inter alia on the payment of a goodwill indemnity to the respondent.

Taking the view that he was entitled to a goodwill indemnity on account of the new customers which he acquired for the respondent and in respect of which the respondent was compensated by Pöensgen, the appellant sued the respondent for

payment of a goodwill indemnity which, according to him, represents the respondent's turnover in 2016 resulting from the new customers acquired.

The first instance court awarded the appellant a goodwill indemnity.

The judgment under appeal reversed that decision and held that the appellant is not entitled to any goodwill indemnity.

III. Ground of appeal in cassation

The appellant raises one ground of appeal worded as follows:

Legal provisions infringed

- *Articles X.5 and X.18, first subparagraph, of the Code of economic law;*
- *Article 17(1) and (2)(a), first indent of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [OJ 1986 L 382, p. 17];*
- *the general principle of law of the primacy of Community law over the rules of national law.*

Contested decisions and grounds

The judgment [...] [under appeal] dismisses the appellant's claims [...] [, in particular, on the following grounds]:

'As regards the goodwill indemnity claimed

The parties to the proceedings agree that there existed between them a commercial agency contract, which Article 1.11 of the Code of economic law defines as a contract by which one party, the commercial agent, is granted continuing authority, in return for remuneration, by the other party, the principal, without being subject to the latter's control, to negotiate and, where appropriate, to conclude transactions on behalf of and in the name of the principal.

The commercial agent is expressly authorised to have recourse to a subagent. The commercial agent, [the respondent], then becomes the principal of the subagent, [the appellant], and must also remunerate him (Article X.5 of the Code of economic law).

Because the contractual relationship between Pöensgen and [the respondent] came to an end, the basis of the sub-agency contract also ceased to exist.

[...]

The [appellant's] claim relates exclusively to the goodwill indemnity provided for in Article X.18 of the Code of economic law, to which a commercial agent is entitled under certain conditions after termination of the commercial agency contract.

[...]

It remains to be considered whether [the appellant] fulfils the conditions for the granting of a goodwill indemnity. The relevant requirements have been narrowly defined by the legislature.

Under Article X.18 of the Code of economic law, the commercial agent is entitled to a goodwill indemnity after termination of the commercial agency contract, if he has brought the principal new customers or if he has significantly developed commercial relationships with existing customers, in so far as the principal can continue to derive substantial benefits therefrom.

It is clear from the customer lists and commission revenue figures provided by [the appellant] that [he] expanded [the respondent's] customer base.

In the light of the wording of Article X.18 of the Code of economic law, it is also necessary for the principal to continue to derive substantial benefits from the new customers brought in, even after the end of the contractual relationship.

The goodwill indemnity, which [the respondent] received on the basis of the termination of the commercial agency contract existing between it and Pöensgen does not constitute a substantial future benefit which [the respondent] received on account of the new customers brought in by [the appellant], but is payable by operation of law.

The claim for a goodwill indemnity is not a future benefit, but arises from the termination of the commercial agency contract [...].

In so far as the wording of Article X.18 of the Code of economic law is clear, it is not necessary to refer to the Court of Justice of the European Union the question proposed by [the appellant] concerning interpretation of the concept of substantial benefit.

[The respondent] will be unable, in future, to benefit from the customers brought in. In that regard, the agreement of 22 May 2017 concluded between [the respondent] and Pöensgen expressly confirms that, through performance of that agreement, all mutual claims of the parties relating to payment, information, invoicing and liability arising from the commercial agency contract terminated on 31 December 2006 [read: 2016] [are] settled, while [the appellant] and Pöensgen will continue to work together and also to benefit from established customers'.

Complaints

Under Article X.5 of the Code of economic law, unless otherwise stipulated the commercial agent may, for the performance of his tasks, have recourse to subagents remunerated by him and acting under his responsibility, for whom he becomes the principal.

Under Article 17(1) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, Member States have the obligation to provide for a specific form of compensation for a commercial agent at the end of a contract.

Member States had a choice between a goodwill indemnity scheme, intended to compensate the agent for the value of the customers which he has brought the principal, and a scheme to compensate for damage resulting from loss of the contract.

As regards the first option, Article 17(2)(a) of that directive provides that:

'The commercial agent shall be entitled to an indemnity if and to the extent that:

- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and

- the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20'.

Opting for the goodwill indemnity, the Code of economic law provides in Article X.18, first subparagraph, thereof that:

'After termination of the commercial agency contract, the commercial agent shall be entitled to a goodwill indemnity if he has brought the principal new customers or if he has significantly increased the volume of business with existing customers, in so far as the principal can continue to derive substantial benefits therefrom'.

The second subparagraph of that provision states that, if the commercial agency contract contains a no-competition clause, the principal is to be deemed, unless it is proved otherwise, to receive substantial benefits.

Accordingly, without prejudice to the situations of exclusion provided for in Article X.18, fifth subparagraph, unrelated to the present case, the commercial subagent is entitled to a goodwill indemnity payable by his principal (the commercial agent in the context of the main contractual relationship) if he proves that he has expanded the customer base of that principal or has significantly increased the volume of business with the latter's existing customers and if the

principal derives substantial benefits from that activity after termination of the sub-agency contract.

The goodwill indemnity, in so far as it is paid to the main agent by its own principal on account of the customers brought in for the main agent by its subagent, constitutes, to that extent, a ‘substantial benefit’ provided to the principal of the subagent after termination of the commercial sub-agency contract.

Neither the undeniable fact that the goodwill indemnity paid to the main agent ‘derives from a right established by law’ nor the fact that the subagent, who became the main agent for the same products after termination of both the main agency contract with his own principal and the sub-agency contract, will continue to ‘benefit from established customers’ in the context of the sub-agency deprives him of the right to the goodwill indemnity after termination of the sub-agency contract.

The judgment, which finds, as regards the commercial sub-agency contract, (i) that it has ended, (ii) that the subagent ‘expanded the customer base’ and, therefore, that he acquired customers for his principal, the main agent, could not, without infringing Article X.18, first subparagraph, of the Code of economic law and Article 17(2)(a), first indent, of Directive 86/653/EEC, reject the appellant’s claim for a goodwill indemnity on the grounds that the indemnity claimed and obtained by the respondent from Pöensgen is not a future benefit, that the goodwill indemnity obtained by the respondent was payable by operation of law and that the appellant and Pöensgen will continue to work together and benefit from established customers.

In the alternative, the appellant proposes that the Court refer the following question to the Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (consolidated version):

[...] [question referred, reproduced in the operative part]

IV. Decision of the Court

According to Article 17(1) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, Member States are to take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

Under Article 17(2)(a), first indent, of that directive, the commercial agent is to be entitled to an indemnity if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing

customers and the principal continues to derive substantial benefits from the business with such customers.

Article X.18, first subparagraph, of the Code of economic law, [...] which transposes Article 17(2)(a) of the directive, provides that after termination of the commercial agency contract, the commercial agent is to be entitled to a goodwill indemnity if he has brought the principal new customers or if he has significantly increased the volume of business with existing customers, in so far as the principal can continue to derive substantial benefits therefrom.

The judgment finds that the appellant was a subagent of the respondent, that he expanded the respondent's customer base and that, on termination of the main agency contract, the respondent obtained a goodwill indemnity from the main principal and the appellant became the agent of that former main principal.

The ground of appeal criticises the judgment for refusing the appellant a goodwill indemnity on the ground that (i) the indemnity obtained by the respondent is not a substantial benefit, since it is not a future benefit but an indemnity payable by operation of law, and (ii) the appellant will continue to work and to benefit from those customers with the former main principal.

The examination of the ground of appeal requires interpretation of Article 17(2)(a), first indent, of Directive 86/653/EEC.

It is therefore necessary, before giving a ruling, to refer to the Court of Justice of the European Union the question as worded in the operative part of the present judgment.

On those grounds,

The Court

Stays the proceedings until the Court of Justice of the European Union has given a preliminary ruling on the following question:

Must Article 17(2)(a), first indent, of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents be interpreted as meaning that, in a situation such as that in the present case, the goodwill indemnity payable to the main agent by reference to the number of customers brought in by the subagent does not provide 'a substantial benefit' to the main agent?

[...] [formation of the court, date, procedural considerations and signatures]